

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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SHAWN BIBLE,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	File No. 5066744
OPEN GATES LLC A/K/A OPEN GATES :	:	
BUSINESS A/K/A OPEN :	:	
GATES GROUP,	:	
	:	ARBITRATION
Employer,	:	
	:	DECISION
and	:	
	:	
TRAVELERS INDEMNITY COMPANY :	:	
OF CT.,	:	
	:	
Insurance Carrier,	:	Head Notes: 1108.50, 1803, 1402.40, 2907
Defendants.	:	

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STATEMENT OF THE CASE

Shawn Bible, claimant, filed a petition in arbitration seeking workers' compensation benefits from Open Gates LLC a/k/a Open Gates Business a/k/a Open Gates Group, employer and Travelers Indemnity Company of Connecticut, insurance carrier as defendants. Hearing was held on October 8, 2019 in Cedar Rapids, Iowa.

Shawn Bible, Nichole Bible, and Tara Benson all testified live at trial. The evidentiary record also includes joint exhibits 1-7, claimant's exhibits 1-10, and defendants' exhibits A-E.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on October 22, 2019.

## ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability claimant sustained as a result of the stipulated December 9, 2016, work injury.
2. Whether defendants are responsible for payment of past medical expenses.
3. Assessment of costs.

## FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Shawn Bible, was 38 years old at the time of the hearing. On December 9, 2016, the date of the injury in question, he was employed by Open Gates LLC a/k/a Open Gates Business a/k/a Open Gates Group (hereinafter "Open Gates"). He was hired as a master electrician by Open Gates in February of 2016. Up until the time of the December 9, 2016 injury, Shawn was able to perform his job without any difficulties and he did not have any preexisting injuries. (Testimony)

Shawn does not remember all the details surrounding his work injury. At the time of the accident, he was on an extension ladder that ran between the first and second floors of the building. Shawn remembers hearing the clicking of the ladder, his co-workers telling him not to move, and trying to grab for something as he fell. He fell approximately 13-15 feet into an elevator shaft and landed on a wood platform. As the result of the work injury, Shawn asserts he sustained a loss of consciousness, multiple rib fractures, right collar bone fracture, one vertebral body fracture, one transverse process fracture of thoracic spine, concussion, rotator cuff tear, fracture of the arterial wall of right external auditory canal, right vertebral artery dissection, subacute subdural hematoma, right temporal bone fracture, right shoulder reverse Bankart lesion, headaches, vertigo, post-trauma psychological injuries, and a traumatic brain injury. (Joint Exhibit 1 & JE2; Claimants Exhibit 1; Testimony)

Following the accident, Shawn was transported via ambulance to the emergency room at the University of Iowa Hospitals and Clinics (UIHC) where he was admitted and stayed until his discharge four days later on December 13, 2016. The UIHC initially diagnosed him with a right clavicle fracture, rib fractures, one vertebral body fracture, and one transverse process fracture. (JE1 & JE2; Cl. Ex. 1; Testimony)

In early January of 2017, while Shawn was recovering from the injury he began to experience dizziness. A CT scan revealed a fracture of the arterial wall of the right external auditory canal and a right vertebral artery dissection. An MRI showed a small subacute subdural hematoma and a temporal bone fracture. (Cl. Ex. 1, p. 1)

Shawn went to the UIHC for his follow-up care. He was overwhelmed by the number of doctors he had to see. He was having to travel to see doctors daily. Shawn requested a doctor be assigned to oversee his care in the hopes that his appointments could be coordinated so he would not have to go daily. He was referred to Eric W. Aschenbrenner, M.D., an orthopaedic surgeon from the UIHC. Both Shawn and his wife, Nicole, testified that Dr. Aschenbrenner was arrogant, simply wanted to move them along, and he was not helpful. They said the doctor did not listen to Shawn's concerns. Rather than helping to coordinate care, Dr. Aschenbrenner ended up being just another doctor that Shawn had to see. Shawn expressed his dissatisfaction with Dr. Aschenbrenner to a representative of the workers' compensation insurance carrier, but Dr. Aschenbrenner remained the authorized treating doctor.

On May 9, 2018, Dr. Aschenbrenner saw Shawn for a review of his symptoms and an evaluation of related function to help determine recommendations regarding possible impairment. He noted that he last saw Shawn on October 18, 2017. At that time, he had placed Shawn at MMI without any permanent restrictions. The notes from the May 2018 appointment state that Shawn had no pain that day. He did occasionally experience headaches, but he had a technique he utilized to avoid letting the headache become too bothersome. Intermittently, Shawn had some discomfort by his right scapula, particularly if he tried to use his bow. He did have some history of dizziness after the accident, and if he was on a lift he still felt his dizziness coming on. Shawn used breathing strategies to calm his dizziness, but he would still feel weird for about another hour. He reported that he had not used a stepladder yet because he had anxiety about going back on a ladder. When working at heights he was now more aware of the heights and careful to make certain he was secure. Since the work incident, if he laid on his right arm too long, he developed numbness in his entire right upper extremity. He still experienced popping by his right shoulder and still had discomfort in his collarbone region. The diagnoses included: chronic right shoulder pain, closed nondisplaced fracture of shaft of right clavicle with routine healing, subsequent encounter, personal history of traumatic brain injury, headache, dizzy, fracture of transverse process of thoracic vertebra with routine healing, and vertebral artery dissection. Dr. Aschenbrenner assigned 1 percent whole person impairment for the shoulder and an additional 6 percent whole person impairment for the thoracic spine. He assigned 2 percent whole person impairment for vestibular disorder from trauma to the head and his ongoing symptoms that intermittently affect his work-related activities on heights. Dr. Aschenbrenner noted that no particular impairment was assigned for the EAC anterior wall nondisplaced fracture and the vertebral artery dissection. He did not assess whether Shawn had any permanent impairment from the external auditory canal dissection or the vertebral artery dissection; Dr. Aschenbrenner deferred to the physicians who treated him for those conditions. (JE3, pp. 1-3)

On June 6, 2018, at the request of his attorney, Shawn saw Stanley J. Mathew, M.D. for an IME. Dr. Mathew opined that Shawn had sustained a total of 23 percent whole person impairment due to the December 9, 2016 work injury. He permanently restricted Shawn to avoid lifting over 20 pounds, repetitive pushing, pulling, and twisting, and patient should limit abduction and adduction of his shoulder. Dr. Mathew noted that

Shawn was now at a higher risk for fall from heights. Additionally, he noted Shawn was at a higher risk for further degeneration of his right shoulder girdle with repetitive use and heavy lifting of his right upper extremity. Dr. Mathew felt that Shawn would benefit from an evaluation by Psychology and Psychiatry. (Cl. Ex. 1)

On September 24, 2018, Shawn saw Valerie J. Keffala, Ph.D., at the UIHC for a follow-up appointment for emotional care. Shawn reported "freaking out" when he was working at heights, standing near a ledge, or on a ladder. Dr. Keffala felt these appeared to be panic attacks. His symptoms included pounding heart, accelerated heart rate, sweating, trembling, shaking, shortness of breath, feeling dizzy and lightheaded, fear of dying due to falling from a height, fear of his family dying due to falling from a height, and persistent worry about experiencing panic in future situations. Shawn was frustrated about the things he can no longer seem to do because of his fear of heights and his ongoing right shoulder pain. Dr. Keffala recommended he be assessed by a physical therapist with expertise in shoulder and arm pain. (JE4, pp. 1-2)

Shawn saw Dr. Keffala again on October 22, 2018. Since the last session he had experienced two episodes of panic related to height. He also noted becoming aware of his experience of depression and anxiety. She gave him some techniques to try to work on his mental health concerns. (JE4, pp. 3-4)

Dr. Keffala saw Shawn again on November 6, 2018. He had recently used a lift at work. One instance when he was inside and not very high, and another instance when he was with another person in the lift, he was fine. However, another time he was outside and alone when he began shaking so badly that he had to come down and have someone else complete the task. Shawn and Dr. Keffala worked on imagery and breathing techniques to try to reduce his fear of heights. He was to follow-up in two to three weeks. (JE4, pp. 5-6)

On February 25, 2019, claimant requested to return to see a doctor about the increased pain he was experiencing. Defendants advised Shawn that if he needed any follow up care he could return to see Dr. Aschenbrenner. Claimant requested another opinion from a different doctor, but defendants did not grant that request. (Cl. Ex. 9) For the reasons stated above, Shawn did not want to return to Dr. Aschenbrenner. Both Shawn and his wife felt that returning to Dr. Aschenbrenner would not be useful. Instead, Shawn sought out a doctor of his own choosing using his health insurance. However, Shawn had difficulty finding a doctor that would get involved in a workers' compensation case. Dr. Mathew agreed to see Shawn for treatment purposes. Dr. Mathew ordered additional physical therapy. (Testimony; JE 5 & 6)

Following the accident, Nicole noticed an emotional/mental change in her husband. Shawn was always on edge and she felt like fear drove him. It is her and Shawn's understanding, that because of his arterial dissection, he is much more likely to have a stroke. Shawn does not like talking to her about the accident. Prior to the accident, Shawn was the adventurous one; after the accident he was less adventurous

than Nicole. Shawn is now fearful of heights. He has had nightmares about the accident and trying to grab for something as he falls. (Testimony)

To the credit of both Shawn and Open Gates, Shawn continues to work for Open Gates. He was off of work for approximately three months after the accident, then he returned to work as a master electrician on a part-time basis. He returned to full-time work, with accommodation, around June of 2017. Nicole noticed Shawn was exhausted when he got home from work each day. Prior to the accident, he was able to work 10 hour days, but he can no longer work that many hours. In August of 2018, Shawn asked his employer if he could work a reduced number of hours, around 30 hours per week; his employer agreed. Due to his pain, Shawn limits his work to four days a week and approximately 8 hours per day. Open Gates has allowed him to reduce his hours, but because he is an hourly employee, he is now earning less money. Both Nicole and Shawn expressed appreciation for how good his employer has been to him. At the time of the hearing, Shawn was working Mondays through Thursdays 6:30 a.m. until 2:30 p.m.; 8 hours per day for four days a week. His reduced hours help keep his pain better controlled. (Testimony)

Since his injuries, Shawn still gets easily frustrated and has nightmares about the accident. He has a fear of heights. He is also angry about the accident because he is not the same as he was prior to the accident. The breathing exercises that Dr. Keffala taught him do provide some temporary relief. He still experiences daily headaches which he described as a stabbing pain on the right side that radiated to his entire head. Some days his headaches are so bad he can barely function. He still goes to work, but he often spends his break time with his head on the table. Shawn is not able to lift as much weight as he was prior to the work injury. He testified that he has difficulty lifting basic tools, such as a drill. He also has difficulty working overhead. According to his testimony, his endurance or stamina is also not as good as it was prior to the accident. He wanted to continue working and did not even want to file a workers' compensation case, however, he no longer thinks he can continue working. Although working causes him a great deal of pain, he continues to go to work so he can provide for his family. If his family did not need the income, he would not continue working due to his pain. (Testimony)

We now turn to the issue of permanency. Dr. Aschenbrenner assigned 9 percent whole person impairment as the result of the December 9, 2016 work injury. Dr. Mathew assigned 23 percent whole person impairment. Dr. Aschenbrenner did not assign permanent restrictions. Dr. Mathew did assign permanent restrictions. However, Shawn testified that he does work outside of those restrictions. I find that neither of the doctor's opinions regarding restrictions is terribly persuasive. I find that Shawn is not able to lift as much weight as he was prior to the work injury. He has difficulty lifting basic tools and working overhead. His endurance or stamina is also not as good as it was prior to the accident. I find Shawn is not able to physically function as well as he did prior to the work injury. He simply cannot perform his job duties in the same manner. I recognize that Shawn has physical limitations due to the work injury; however, I am not willing to adopt the restrictions set forth by Dr. Mathew because

Shawn is currently working outside of those restrictions. Clearly, this work injury has had an adverse impact on Shawn's abilities. Prior to the injury, he could work 10-hour days. At the time of hearing he was only able to work 8 hours per day and only four days per week.

In addition to allowing Shawn to reduce the number of hours he works per week, Open Gates has also allowed his co-workers to help him. His co-workers assisted him with activities such as pulling wire and conduit and lifting. However, at the time of the hearing the number of co-workers at the employer had decreased so there were not as many people around to help Shawn. Because Shawn receives less help, he has experienced an increase in pain. He takes ibuprofen or Tylenol to help get him through the work day. Shawn avoids using ladders, but he does use lifts. He is trying to ease back into using ladders. He is getting to the point where he can go up two or three rungs on an A-frame ladder. Shawn does not believe he could work as an electrician for any other employer. (Testimony)

Claimant relies on the opinion of Barbara Laughlin a vocational consultant. Ms. Laughlin conducted an employability assessment of Shawn. As part of that assessment she spoke with Shawn and reviewed his medical records. She issued a report dated October 1, 2018. She opined that Shawn was unable to return to his previous work as an electrician and if he were to lose his present employment he would sustain a significant wage loss. (Cl. Ex. 4)

After receiving additional records, Ms. Laughlin issued another employability assessment on May 6, 2019. She stated that Shawn believed his employer has no record of Dr. Mathew's restrictions, and they believe he has no restrictions. At work he was still lifting over 20 pounds, probably lifting around 40 pounds, and picking up supplies such as bags of concrete for the crew. Shawn told Ms. Laughlin that everything he did at work was over 20 pounds. He also told her he was on a step ladder and scissor lift to reach his work. He had spells where he felt as though he was in a fog. His concentration was worse and headaches had been severe. Ms. Laughlin's report also contained summaries of conversations she had with several individuals who have either worked for or are working for Open Gates, including members of management.<sup>1</sup> (Cl. Ex. 5)

On August 30, 2019, at the request of the defendants, Michelle Holtz, a vocational counselor issued a rebuttal opinion to the employability assessments prepared by Ms. Laughlin. Ms. Holtz is critical of Ms. Laughlin's reports and offers her own opinions regarding Shawn. Ms. Holtz has never talked with or met Shawn; defendants never requested that claimant meet with her. Ms. Holtz opined that if one

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<sup>1</sup> It was inappropriate for Ms. Laughlin to speak with the defendants' employees, especially those in management, outside the presence of defense counsel. There is no evidence to suggest that claimant's counsel instructed Ms. Laughlin to contact these individuals; therefore, I am going to assume that Ms. Laughlin undertook these actions on her own and not at the direction of claimant's counsel. However, claimant's counsel should notify Ms. Laughlin that such contact was inappropriate.

assumes Shawn is released to return to full-duty work with no permanent physical or psychological limitations, then he had sustained no loss of access to the jobs in his labor market area. Ms. Holtz opined that if one assumes Shawn had permanent restrictions as set forth by Dr. Mathews, then he had sustained somewhere in the neighborhood of 11 to 16 percent occupational loss. (Def. Ex. B)

On September 27, 2019, Ms. Laughlin conducted another employability assessment. Since her last report, she had received additional medical information and reviewed the deposition of the claimant and the report of defendants' vocational consultant, Michelle Holtz. In her report Ms. Laughlin sets forth the ways in which she feels Ms. Holtz's opinions are flawed. (Cl. Ex. 10)

Unfortunately, both vocational opinions are flawed. Ms. Holtz has never met or talked to Shawn. Based on her report, it is not evident if Ms. Holtz understands the frequency and severity of Shawn's headaches. It is also not clear to the undersigned if she is aware of the assistance that Shawn receives in his current position. However, she does note some important transferable skills that Shawn has acquired throughout his lifetime. Nonetheless, I do not find the conclusions in her report to be particularly helpful. (Def. Ex. B) As pointed out in Ms. Holtz's report, Ms. Laughlin's reports and conclusions are also flawed. (Cl. Exs. 4, 5, 10) I do not find the conclusions contained in the vocational reports to be persuasive.

Shawn worked at Open Gates as a construction co-manager, as a master electrician, and after the injury he worked as a master electrician/project manager. As a construction co-manager he ran projects, lined up crews to do the jobs, and bid on outside jobs. As a master electrician he handled all of the electrical work for the facilities. In August of 2018, Open Gates moved Shawn over to a master electrician and project manager. All electrical jobs go through him, so that he may plan and coordinate the jobs. He performs the tasks he is comfortable performing himself. He has been training his crew to do the more physically challenging tasks. He still performs the complex electrical jobs. He has his crew perform the overhead work. He has trained his crew to do the work on the rough-ins. Shawn does all the makeups on the equipment and supervises to make certain everything is done correctly. (Testimony; Def. Ex. A)

Shawn does have transferable skills. He can type without looking, is able to use spreadsheets, knows how to conduct internet searches, and use layout and design software. (Def. Ex. A) In 2015 Shawn opened a business by the name of Bible and Son Outdoor. It started as a gun and archery shop. However, he shut the business down after the accident. They restarted the business in 2019 as more of a camper rental business; he and his wife own two campers which they rent out on the weekends. He previously owned his own electrical company that also performed renovations. (Testimony)

Shawn has worked as an electrician his entire adult life. While he was in high school he worked at a Wal-Mart and he also worked detasseling corn. (Testimony)

Shawn can no longer lift heavy items, especially overhead. He experiences vertigo when he looks up in certain directions. He has daily headaches. He experiences a stabbing pain on the right side of his head that radiates to his entire head. Some days his headaches are so severe that he can barely function. On those days he still reports to work but there are times he will just sit in the break room with his head on the table. (Testimony)

Sometime after the December 9, 2016 injury, Open Gates had a reorganization. As a result, Shawn was given a permanent new job as a master electrician. He is paid \$26.79 per hour. At the time of the injury he was paid \$25.00 per hour.

Shawn asserts that he is an odd-lot employee. However, I do not find that argument to be persuasive. Shawn is still employed as a master electrician. No doctor has set a limit on the number of hours he may work a week. Additionally, he has numerous transferable skills that would allow him to find a job. He has acquired organizational skills, the ability to multitask, manage personnel, work with computers, and meet deadlines. (Def. Ex. B) I find that claimant did not provide a prima facie case that he is not employable in the competitive labor market.

Shawn also asserts that he has sustained permanent and total disability as the result of the December 9, 2016 work injury. However, Shawn continues to be employed as a master electrician and, as noted above, he has numerous transferable skills. He has also expressed an interest and ability to operate an outdoor/hunting type business on a full-time basis. I find that he did not carry his burden of persuasion to establish that the only services he could perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

I find that Shawn has sustained significant industrial disability due to the work injury. Considering Shawn's age, educational background, employment history, ability to retrain, lack of motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 35 percent loss of future earning capacity as a result of his work injury with Open Gates.

Next, claimant is seeking payment of past medical expenses as set forth in claimant's exhibits 2 and 3. Claimant is seeking payment for treatment at UnityPoint Health from April 8, 2019 through August 27, 2019. Defendants make no argument as to why they should not be responsible for these medical expenses. Based on the treatment records contained in joint exhibit 5, I find that the treatment was reasonable and necessary due to the December 9, 2016 work injury. Additionally, I find that the listed expenses are causally connected to the work injury. Thus, I find defendants are responsible for the medical expenses contained in claimant's exhibits 2 and 3.

Finally, claimant is seeking an assessment of costs as set forth in claimant's exhibit 6. Costs are to be assessed at the discretion of the hearing deputy. I find that claimant was generally successful in his claim and therefore I exercise my discretion



and assess costs against the defendants. Specifically, claimant is seeking the one hundred dollar (\$100.00) filing fee. I find that this is an appropriate cost under 876 IAC 4.33(7).

Claimant is also seeking costs associated with two vocational expert reports authored by Ms. Laughlin. The cost of two practitioner reports is allowed as costs pursuant to our rule 876 IAC 4.33(6). It has been determined that reports from vocational counselors and physical therapists are considered practitioner reports, as defined in our rule 876 IAC 4.17. However, claimant's exhibit 6 merely sets forth totals in the amount of \$1,198.88 and \$506.00. There is no invoice or detail to set forth what portion of those charges were for reviewing materials versus actually preparing the report. Only charges related to drafting of a report to avoid the necessity of trial testimony are legitimately taxed as costs. I cannot decipher, and I am not willing to speculate, on the charges specifically attributed to the vocational expert's drafting of a report. Thus, I do not assess any costs for the vocational reports.

Defendants are assessed costs totaling one hundred and no/100 dollars (\$100.00).

Claimant was also seeking to recover the cost of the IME report of Dr. Mathew. However, at the time of the hearing, counsel for the parties advised the undersigned that this is no longer an issue. I find that this issue is moot.

#### CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001);

Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Shawn contends that he is an odd-lot employee. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

I conclude that Shawn failed to prove a prima facie case that he is incapable of obtaining employment in any well-known branch of the labor market. Thus, I conclude that the burden of production never shifted from claimant to the defendants to refute the odd-lot claim. Nonetheless, I find that claimant failed to prove by a preponderance of the evidence that the only services he can perform are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.

Shawn also argues that he is permanently and totally disabled as the result of the work injury. Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Based on the above findings of fact, I conclude that Shawn failed to prove he is permanently and totally disabled. I found that claimant failed to demonstrate that his injuries preclude him from performing work that his experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform.

I also conclude that Shawn did sustain industrial disability as the result of this work injury. Based on the above findings of fact, I conclude he has sustained a 35 percent loss of future earning capacity as a result of his work injury with Open Gates. As such, he is entitled to 175 weeks of permanent partial disability benefits.

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy hearing the case. 876 IAC 4.33. Pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), I conclude that only charges related to drafting of a report to avoid the necessity of trial testimony are legitimately taxed as costs.

Based on the above findings of fact, I conclude defendants are assessed costs in the amount of one hundred and no/100 dollars (\$100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of six hundred ninety-eight and 42/100 dollars (\$698.42).

Defendants shall pay one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on the stipulated commencement date of March 27, 2017.

Defendants shall be entitled to credit for all weekly benefits paid to date.

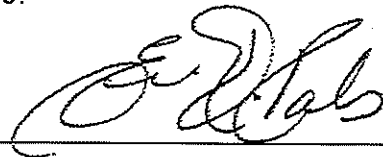
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall be responsible for medical expenses as set forth above.

Defendants shall reimburse claimant costs in the amount of one hundred and no/100 dollars (\$100.00).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 6th day of January, 2020.



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ERIN Q. PALS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

David O'Brien (via WCES)  
Kevin Rutan (via WCES)

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.